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The Human Rights of Older Persons

A Human Rights-Based Approach
to Elder Law

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In memory of Ian Mackie.

Preface

The ageing global population presents challenges not only for individuals themselves but also for a range of other stakeholders, notably governments and policy-makers, legal, financial and health professionals, and the aged care sector. The paid and unpaid workforces, financial markets, housing and transportation infrastructure, health and aged care, social security and welfare systems, for example, will all be affected. There are also significant implications for families, friends and unpaid carers of older people, which also highlight the importance of intergenerational bonds existing within society (discussed in Chap. 1).

The perception that ‘ageing’ is a process to be endured, not enjoyed, and that ‘old age’ is something to be feared, is persistent. The idea that older people are vulnerable, frail, dependent, inflexible and a drain on finite financial and health resources also endures. Such notions are representative of the ageist assumptions that pervade modern society, often reinforcing poor intergenerational relations and discriminatory conduct, particularly in the workforce (discussed in Chap. 5). Capacity (discussed in Chap. 6) also continues to raise challenges, especially in the light of mentally disabling conditions such as dementia. Elder abuse, although underreported, is unacceptably common (discussed in Chap. 7). Negative outcomes can also result such as financial insecurity (discussed in Chap. 8), lack of secure housing (Chap. 9), as well as a lack of access to quality health and aged care services (Chap. 10).

The human rights of older persons are violated where they experience abuse, neglect or maltreatment, or when they are unable to access justice, appropriate instead healthcare or an adequate standard of living including safe housing. When older persons are unable to participate in education or employment due to age-based discrimination or are precluded from fully participating in their communities because of physical, systemic or social barriers, their human rights are also infringed. Significant too is the fact that human rights harms can frequently result in further human rights violations, thus often reinforcing vulnerabilities and inequities experienced throughout the life course.

Human rights are guaranteed under international treaties such as the *Universal Declaration of Human Rights*, *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*, as well as regional instruments and domestic laws (discussed in Chaps. 2–4). Governments are therefore obliged to take steps to respect and protect human rights, including ensuring that both government and non-government actors adhere to appropriate standards. However, although older people are entitled to the same rights as all individuals, they have specific needs which often go unmet, a situation which is compounded by ageist attitudes. Absent an international convention on the rights of older persons (CROP), countries lack the specific guidance and obligations to adequately address older people's human rights, and the international community lacks the necessary oversight and enforcement which would come with a dedicated treaty.

The law, both internationally and nationally, therefore has a significant role to play. The multifaceted, intersecting and often complex areas of law which impact older persons, either directly or indirectly, comprise an amorphous grouping known as 'elder law'. They are frequently fragmented and inconsistent across jurisdictions. Crucially, the law is also the medium through which many human rights threats are perpetrated against older persons, whilst simultaneously offering a means through which to seek remedial relief if harms occur. The issue of access to justice is thus fundamental in attempting to seek any legally enforceable relief.

The need to dedicate more attention to the various issues associated with ageing is increasingly being recognized. This work of research contributes to that discourse through synthesizing and critically analysing the existing literature across a number of intersecting areas to generate a new understanding of 'elder law' within a proposed human rights framework (set out in Chap. 3). Whilst this book argues for more research in dedicated areas (discussed throughout), one of the fundamental premises advanced is that the issues arising in 'old age' are often the culmination of experiences occurring throughout the whole life course and, thus, 'ageing' is not something that happens to one's future self. Consequently, a paradigm shift must occur transitioning away from traditional medical and charity-based models of responding to 'old age' to instead acknowledge older persons as active holders of legally enforceable rights. It is argued here that a CROP is an essential tool in achieving this, but that even without a CROP there is much to be gained from a human rights-based approach.

The critical discussion undertaken exploring the role of the human rights principles of autonomy, dignity, equality, liberty, non-discrimination and participation, as well as the specific rights they underpin (Chaps. 2–4), assists in generating a new appreciation for the range of impacts, vulnerabilities and inequities that older persons experience in the identified realms of financial security, accommodation, health and aged care, particularly when considering the crosscutting issues of ageism, capacity and elder abuse. The concluding chapter (Chap. 11) therefore draws together a selection of the key themes emerging from this novel analysis before presenting the main recommendations designed to promote human rights-based legal and policy reform. Accordingly, this work is useful for people

within a number of disciplines including those involved in academia, policy, as well as legal and health practice. However, this work does not, and indeed cannot, purport to delve into jurisdictional intricacies given that its focus is on raising conceptual issues relevant to developing a human rights framework for ‘elder law’. It is the critical discussion of the literature combined with the authors’ practical experience and theoretical knowledge of the broader and interconnected contextual settings that combine to contribute new knowledge to the existing discourse. No other work has argued for this specific approach in relation to the domains of finance, accommodation and health analysed in the context of the fundamental issues of ageism, capacity and abuse.

We do recognize, however, that authentically addressing the ageist assumptions and practices pervasive in the current legal and policy approaches to ageing will require detailed and considered input from a wide variety of stakeholders. To this end, this book also champions the necessity of understanding the lived experiences of older persons and hearing their voices in order to achieve meaningful outcomes. We have therefore undertaken this work with a view to contributing to the literature on what is a crucial measure of our society—the treatment of older people.

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Abbreviations

ADL	Activities of daily living
AHD	Advanced health directive
CCRC	Continuing Care Retirement Community
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
CRC	Convention on the Rights of the Child
CROP	Convention on the Rights of Older Persons
CRPD	Convention on the Rights of Persons with Disabilities
ECH	Extra care housing
EPA	Enduring power of attorney
EPAU	Elder Abuse Prevention Unit
HRC	Human Rights Committee
IADL	Instrumental activities of daily living
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OECD	Organisation for Economic Cooperation and Development
OEWGA	Open-Ended Working Group on Ageing
UDHR	Universal Declaration of Human Rights
UN	United Nations
WHO	World Health Organization

Chapter 1

Introduction



The world is experiencing a demographic shift as life expectancies extend and birth rates drop. The associated economic and social transformations present numerous challenges for our societies but, to date, policy responses have often been inadequate or inappropriate and have failed to sufficiently address systemic problems such as ageism and elder abuse. In many cases, laws which are designed to support or protect older persons in fact perpetuate infringements of their human rights, either through poor design, insufficient resourcing, denial of access to justice or a combination of these factors. This book argues that an approach based on the laws and principles of human rights would provide a better foundation for the design and implementation of all laws which affect and interact with the lives of older persons. This body of ‘elder law’ includes the laws which regulate discrimination, legal capacity, elder abuse, financial and social security, estate planning, accommodation services, and health and aged care. It is argued that a shift to a human rights-based approach would help to alter community attitudes about older persons, moving away from ideas premised on protection and dependence, towards a greater valuing of each individual’s inherent dignity, autonomy and capability, regardless of their age.

1.1 Introduction

The fact that populations are ageing at unprecedented rates is an inescapable global phenomenon. The United Nations (UN) has identified that ‘population ageing is poised to become one of the most significant social transformations of the twenty-first century’.¹ This demographic change presents a number of challenges, only some of which can be fully appreciated at the present time, with novel issues expected to materialise into the future. These challenges are developing alongside, and in connection with, rapid advancements in technological innovation, which promises

¹United Nations, Ageing.

potential solutions but also raises new problems requiring careful consideration. They are also occurring in the age of climate change, which introduces new threats to health and well-being, and presents an enormous economic and social challenge of its own.²

The challenges presented by the globally ageing population confront not only the ageing individuals themselves but also a range of other stakeholders. The scale of the demographic shift is a huge economic challenge for governments, as more people move out of the paid workforce (thereby diminishing the tax-base) and come to require greater support through social security, as well as health and aged care. There will be implications across society involving the paid workforce, financial markets, housing and transportation infrastructure, health and aged care, and social security. As these existing systems, and the people who work within them, are placed under greater strain there are also significant impacts for the families, friends and carers of older people, as well as for intergenerational bonds within society generally. The consequences for older individuals can be particularly damaging and in recent years reports of neglect, maltreatment and abuse have become increasingly common.³ As the number of older people within our communities increases, these problems become more challenging to address, while at the same time becoming more pressing.

This is not to say that ageing is a negative experience—it is not. Nor should the ageing population be viewed as a ‘threat’ or our thinking limited to problematisation. Nevertheless, ageist stereotypes continue to pervade many societies, represented by notions that older persons are vulnerable, dependent, frail, inflexible and a burden on the community.⁴ Attention is increasingly being focused on ‘rethinking’ ageing, in particular reconsidering the idea that ‘ageing’ is tied to a specific chronological age, in an effort to combat these attitudes.⁵ The age at which a person becomes ‘older’ is the subject of much debate, and there is growing realisation that negative attitudes can attach to a particular age if too much emphasis is placed on a specific number.⁶ It is also essential to recognise that older persons are by no means a homogenous group. However we define ‘older persons’, the category will represent a diverse mix of backgrounds, experiences, preferences, interests and skills—as diverse as any age-defined group within society. Having said this, there is some utility to defining age and ‘older persons’ by reference to a chronological age, particularly in relation to population estimates and for research purposes such as understanding the prevalence of elder abuse.

Experiences of ageing, and the negative associations that currently attach to ageing, can have significant consequences for individuals as they grow older. For example, autonomy can be questioned with older people being viewed as vulnerable and therefore in need of protection. Further, financial pressures may result in more older people being required to remain in paid work longer before they are able to

²Lewis (2018a), 159–60.

³United Nations, Ageing.

⁴Lagacé et al. (1989); Butler (1989), 139.

⁵See, for example: World Health Organization (2015), 64–6; Beard et al. (2016), 163–6.

⁶See, for example: Australian Law Reform Commission (2016), 21–2.

retire, which can therefore mean that they are exposed to discriminatory practices, particularly if they are re-entering the workforce at an older age. Older people may also experience a heightened risk of vulnerability to abuse. Such abuse can include physical, psychological, sexual and financial harm.⁷ Significantly, perpetrators of elder abuse are often the very individuals and/or groups tasked with caring for older persons, and can include family members, friends and carers, as well as strangers.

The various and interconnected social and economic challenges presented by the ageing population have significant implications for our legal systems. The areas of law which impact, either directly or indirectly, on older persons comprise a body known collectively as ‘elder law’. These areas are multifaceted, intersecting and frequently complex. They are also fragmented and inconsistent across different jurisdictions. This has been recognised by national and international advocacy groups who have highlighted the need for changes to a variety of legal and policy frameworks.⁸

Elder law encompasses any laws, regulations or processes that older people come into contact with but most frequently tends to include laws related to age-based discrimination, employment, legal capacity, elder abuse, financial management, estate planning, accommodation services, as well as health and aged care. It must also be acknowledged that accessing justice can be difficult for older persons no matter what legal issue they are confronting. There can be many barriers, particularly for those with impaired or lost capacity as well as victims of abuse who can experience a lack of autonomy and/or participation in decision-making. Any assessment of elder law must therefore take into account not only the substantive content of the law but also its processes for access, implementation and enforcement, to ensure that barriers to justice are adequately addressed.

As will be seen throughout this book, much of the discussion around improving elder law adopts the objective of preserving individual autonomy for persons as they age wherever possible. This requires a nuanced understanding of autonomy, for example through the concept of relational autonomy, which recognises the value of relationships of care and support which facilitate the exercise of autonomy.⁹ This more relational understanding is particularly important given the role that familial and/or carer support can play in retaining independence as people age. It is also influential in the paradigm shift which has been occurring, for example, from substitute to supported decision-making for people with impaired capacity.¹⁰ Given the centrality of autonomy and decision-making in many areas of elder law and the implications a loss of autonomy can have for access to justice, it is a recognised touchstone throughout the book. We do not, however, propose to examine the particular theory of relational autonomy in detail given that our aim here is restricted to exploring a human rights framework for elder law.

⁷World Health Organization (2017a).

⁸See, for example: United Nations General Assembly (2013); AGE Platform Europe (2018); Doron and Apter (2010); Fredvang and Biggs (2012), 21; International Expert-Conference on the Human Rights of Older Persons (2018).

⁹See, for example: O’Connor (2010).

¹⁰Convention on the Rights of Persons with Disabilities (2006), art 12 (‘CRPD’).

Older people frequently report diminishing respect for their autonomy and dignity, and a loss of connectedness as they age.¹¹ These experiences are linked to pervasive ageist attitudes within society and can all be viewed as threats to older persons' human rights. Where older persons experience abuse, neglect or maltreatment, or when they are unable to access justice, appropriate healthcare or an adequate standard of living, their human rights are violated. When they are unable to participate in education or employment due to aged-based discrimination or are precluded from fully participating in their communities because of physical, systemic or social barriers, their rights are infringed in ways that can lead to further human rights harms.

These rights are guaranteed under international treaties, including the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), as well as regional instruments and domestic laws. Under such laws, governments are obliged to take steps to respect, protect and fulfil the human rights of older persons. This includes ensuring that both government and non-government entities adhere to human rights standards.

With this in mind, this book argues that a human rights-based approach is an ideal and novel framework in which to analyse the various challenges associated with the ageing population and to develop appropriate legal responses. A human rights-based approach is one which emphasises the inherent dignity, autonomy and liberty of each individual, and which champions the economic, social, cultural, civil and political rights of all people. It is therefore uniquely placed to address the varying interconnected issues facing older persons and falling within the scope of elder law. No other work has applied such an approach to the domains of finance, accommodation and health while incorporating analysis of the fundamental cross-cutting issues of ageism, capacity and abuse.

The specific rights found within human rights law emphasise the importance of a number of key principles which are fundamental to human rights generally, most notably, respect for inherent human dignity. This is recognised as the source of all human rights and a foundational principle in the *Universal Declaration of Human Rights* (UDHR) as well as other human rights treaties.¹² It is the essential value underlying rights such as the rights to the highest attainable standard of health,¹³ privacy,¹⁴ freedom from cruel, inhuman and degrading treatment,¹⁵ an adequate standard of living,¹⁶ and social security.¹⁷ Respect for the autonomy of an individual is another

¹¹ See, for example: Australian Institute of Health and Welfare (2019a); Barbosa Neves et al. (2019); Relationships (Australia 2018); Sutin et al. (2018).

¹² Universal Declaration of Human Rights (1948), preamble ('UDHR'). See also preambles of International Covenant on Civil and Political Rights (1966) ('ICCPR') and *International Covenant on Economic, Social and Cultural Rights* (1966) ('ICESCR'), and CRPD, art 3.

¹³ ICESCR, art 12.

¹⁴ ICCPR, art 17.

¹⁵ CRPD, art 15.

¹⁶ ICESCR, art 11.

¹⁷ UDHR, art 22 and ICESCR, art 9.

fundamental principle of human rights, which can clearly be seen translated into specific rights such as freedom of movement¹⁸ and freedom to choose one's employment.¹⁹ Another key principle of human rights is non-discrimination.²⁰ International human rights treaties all emphasise that, because people possess human rights by virtue of their being human, it follows that there can be no grounds to discriminate against any person in the fulfilment of their human rights—human rights belong to all persons equally and all persons are entitled to the full range of human rights. Taken together, these principles and the specific rights they underpin provide a useful way of understanding the range of impacts and vulnerabilities that are experienced by older persons. They furnish a language for recognising and protecting the opportunities and contributions of older people and can be used as the basis for a human rights-based approach to elder law. Such an approach would require that, at all times, the basic dignity and autonomy of individuals must be respected, and that older persons' freedom to make decisions for themselves must be respected and supported wherever possible.

However, existing mechanisms for the protection of these rights are inadequate. Countries need to increase their efforts to strengthen the protection of the rights of older people, both on a national and an international scale. There is currently no international instrument which specifically addresses the rights of older people, despite over a decade's worth of work within the UN human rights bodies advocating for such protections. There was even a call in the 2016 report by the Independent Expert on the Enjoyment of all Human Rights by Older Persons for states to 'step up their efforts to determine the best way to strengthen the protection of the human rights of older persons and to consider the various proposals that have been made, notably the elaboration of a convention on the rights of older persons'.²¹

Although older people are entitled to the same rights as all other individuals and are protected by the major international human rights instruments like the ICCPR and ICESCR, they have particular needs which too often are not met, a situation which is compounded by the ageist attitudes pervasive in society. Older people also experience unique forms of abuse and exploitation which warrant protection under human rights law. Absent an international convention on the rights of older persons (CROP), responsibility falls back to individual countries to implement and safeguard the general rights found within international human rights law in ways which adequately address the needs and experiences of older persons, but without the specific guidance or commitment which would come with a dedicated treaty.

A human rights-based approach to elder law would significantly enhance existing domestic protections of older persons' rights. In Australia, for example, the international instruments and principles have implications for several key policy areas relating to older persons. They represent important standards applying to issues such as driving, housing, making and revoking enduring documents, the provision

¹⁸ICCPR, art 12.

¹⁹Respect for individual autonomy is a general principle of the CRPD, art 3.

²⁰UDHR, art 2.

²¹Kornfeld-Matte (2016), para 125.

of health and aged care, end of life and palliative care, and financial management. However, although human rights principles provide an innovative normative framework in which to approach the issues in this area, human rights are not currently well-protected in Australian domestic law. This means that there is, currently, limited ability for older individuals to enforce their rights, particularly through legal action. Nevertheless, there has recently been increasing attention dedicated to protecting vulnerable older people in Australia. For instance, in 2017 the Australian Law Reform Commission (ALRC) conducted an inquiry into elder abuse and a Royal Commission into Aged Care Quality and Safety was established in 2019.²² Both of these bodies adopted the language of human rights, with the ALRC recommending that responses to elder abuse adopt a human rights framework.²³ Without stronger human rights laws, however, relying on existing national frameworks of human rights protections and international treaties will provide limited benefits for older persons, as the existing protections are often incomplete and inadequately enforced. This is a problem faced not only by Australia but one which is present worldwide.

The ability of older persons to both participate in, and benefit equitably from, societal development needs to be protected and facilitated.²⁴ This book responds to this need, seeking not only to explore the international context but also to apply a human rights lens to the existing mechanisms within domestic laws to protect the rights of older people. We seek to demonstrate the significant potential for approaches to ageing to draw further on human rights, both with respect to protecting specific rights as well as acknowledging the fundamental human rights principles of autonomy, dignity and non-discrimination.

To this end, this book provides a detailed and comprehensive human rights analysis of some of the key areas of law affecting older persons. We have drawn on multidisciplinary scholarship and international advocacy to identify areas for examination. For example, the Stanford Centre on Longevity identifies three domains for well-being into older age, financial security, social engagement and healthy living, and these domains can be helpful in thinking about the wide range of issues which fall within the scope of elder law.²⁵ Variations on these three themes repeat throughout the literature, and are predictably expanded and developed within relevant disciplines such as public health, gerontology, social policy, psychology, health law and medical ethics. International instruments like the *United Nations Principles for Older Persons* also highlight the importance of independence, participation, care, self-fulfilment and dignity as framing principles, and these too can help to identify areas of the law which require attention.²⁶

²²There have been a number of phases to the ALRC Inquiry. An initial Issues Paper was released for comment in June 2016, with a Discussion Paper published in December 2016 which set out preliminary proposals for law reform and invited further public comment. The Final Report was handed down on 15 June 2017.

²³Australian Law Reform Commission (2017).

²⁴United Nations Department of Economic and Social Affairs, Population Division (2017), 2.

²⁵Stanford Center on Longevity (n.d.).

²⁶United Nations Principles for Older Persons (1991).

From this broad base of scholarship and advocacy this book identifies a number of areas for analysis. Several issues cut across various areas of law, for example, ageism (discussed in Chap. 5), capacity (Chap. 6), abuse and access to justice (Chap. 7), while others can be more easily categorised according to the specific legal questions that they raise such as financial security (Chap. 8), accommodation (Chap. 9), and health and aged care (Chap. 10). These particular topics form the focus of the remainder of this book. First, however, this chapter will provide more detail on the nature and extent of the challenges posed by the ageing population. This will include a discussion in the next section of some of the key terms in this area, such as what is meant by ‘older’ and ‘elder law’, and clarify the way that terminology will be used throughout the book. Later sections in this chapter will then outline the demographic changes occurring before introducing the main topics for analysis. The chapter will also identify two recurrent themes in the elder law context, access to justice and women’s experiences of ageing.

1.2 Defining Elder Law

Before we can analyse ‘elder law’ through a human rights lens, it is important to acknowledge some of the terminological and conceptual complexities that exist in this area. At the outset, we need to recognise that the idea of speaking of the human rights specifically of older persons or of a dedicated body of elder law is itself contested. Some have questioned whether delineating older persons as a particular cohort in need of special attention (including through dedicated human rights instruments) is itself an ageist undertaking.²⁷ However, identifying and advocating for the rights of older persons is not intended to segregate older persons or cast them as different in any negative sense. Rather, it is intended to recognise that ageing is a continuing process everyone experiences throughout the life course, and that human rights do not diminish as people age. All people continue to be entitled to the same human rights, no matter their age or level of ability. This book argues in favour of a dedicated human rights instrument for older persons, not to give them different rights, but to proclaim strongly their entitlement to the same rights while recognising the particular ways in which those rights can be impacted as people age. In the same way that the *Convention on the Rights of Persons with Disabilities* articulated meaningful entitlements and obligations in the process of unpacking core human rights for persons with disabilities, a CROP would be able to respond to the lived experiences of older persons, including their experiences of ageism, and develop a roadmap for better implementation within domestic law. From that starting point, this section will now address other areas of definitional uncertainty and specify the terminology adopted throughout this book to lay the groundwork for later analysis.

²⁷Williams (2003); Avers et al. (2011); Greengross (2019).

1.2.1 *Older or Elder?*

Language can be powerful, especially when considering the negative and discriminatory, that is, ageist, implications that can exist with some terms used in association with ‘ageing’.²⁸ For example, the use of the word ‘old’ as a descriptor—the *old* man, the *old* woman, distinct from simply the man, the woman—is often more than just a factual adjective. It instead has a negative connotation that can affect an individual’s interpretation of the situation. Take, for instance, the following two scenarios: first, the woman had a car accident; and second, the old woman had a car accident. The use of the word ‘old’ in the second scenario is more likely to give rise to a perception that it was the driver’s fault as she was ‘old’. It is important, then, to think critically around the language used and the effect that this language can have—either consciously or subconsciously.

As noted above, the question of the age at which a person should be considered ‘older’ is contested, as is the question of whether ‘older’ is even the appropriate term to be using given the ageist assumptions such language can engender. Significant too is the choice between ‘older’ or ‘elder’ as appropriate terms.²⁹ These terms are often used in substitution for one another. The term ‘elder’ can, however, attract particular cultural significance raising questions as to whether it is appropriate to use in a more general sense.³⁰ The use of the term ‘elderly’ has also been criticised as being ageist, for the reasons discussed above.³¹ Nevertheless, the terms are so entrenched in the modern vernacular that it will be difficult to displace them. They also now attract ‘brand recognition’, for instance increasing recognition around ‘elder law’ and ‘elder abuse’. The growing recognition of the terms can thus attract much needed attention, and potentially funding. Consequently, it may not be prudent to now try to change the language adopted when those terms are becoming more identifiable. The question also arises, if not ‘elder’ then what?

The UN Committee on Economic, Social and Cultural Rights previously adopted the term ‘older person’ in preference over ‘elder’ in 1995 but this debate is in no way settled.³² What is important is appreciating the power of language and challenging the ageist assumptions that attach to the language currently used in connection with ageing although, as will be discussed, issues of ageism run deeper than linguistics alone. In this book, we tend towards the term ‘older’ but retain the phrases involving ‘elder’ such as elder law.

²⁸See, for example: Sunlife (2019); Hill (2019).

²⁹See, for example: Australian Law Reform Commission (2017).

³⁰Australian Law Reform Commission (2016), 22.

³¹Avers et al. (2011), 153–5.

³²Committee on Economic, Social and Cultural Rights (1995).

1.2.2 What Age is ‘Older’?

At what age then does someone become ‘older’? Different definitions of ‘older’ have been postulated globally, ranging from fifty-five years and older through to sixty-five years and over.³³ According to the United Nations, the term ‘older’ most commonly refers to people aged over sixty years.³⁴ However, in Australia, for example, a person is generally considered ‘older’ once they reach sixty-five years of age.³⁵ The World Health Organization (WHO) states that the categorisation differs amongst countries but is generally connected to the age at which a person can retire.³⁶

In the ALRC Discussion Paper, a distinction was drawn between ‘old’ and ‘old, old’.³⁷ ‘Old, old’ is generally understood as applying to any person over the age of eighty. There is indeed utility in the ‘old’/‘old, old’ distinction.³⁸ Such a differentiation is useful given that the risk of neurodegenerative conditions, such as Alzheimer’s disease, is age-related and often expressed for specific age cohorts. For example, the risk of dementia-related conditions, such as Alzheimer’s disease, is substantially higher for people aged eighty years and over than it is for people aged sixty or sixty-five years and over (although this is not to ignore the risk of early on-set dementia).³⁹ Further, as people age, and especially as they enter the ‘old, old’ age range, there is an increased risk of geriatric syndromes including frailty, falls, pressure ulcers and incontinence.⁴⁰ Associated with this is the possibility of increased dependence or vulnerability and thus the threat of abuse may also escalate.

For our purposes, we define ‘older’ as anyone aged sixty-five years and over. We will indicate where any specific issues exist in relation to the ‘old, old’ category (that is, anyone aged eighty years and over). It should also be noted that the definition of ‘older’ for indigenous peoples can range from approximately fifty years and over given shorter life expectancies.⁴¹ In Australia, for example, this is because Aboriginal and Torres Strait Islander people generally experience poorer health and have higher rates of disability than other Australians in a commensurate position.⁴²

³³See, for example: United Nations Department of Economic and Social Affairs, Population Division (2015a); Australian Institute of Health and Welfare (2017); World Health Organization (2004).

³⁴United Nations Department of Economic and Social Affairs, Population Division (2015a).

³⁵Australian Institute of Health and Welfare (2017).

³⁶World Health Organization (2004).

³⁷Australian Law Reform Commission (2016), 22.

³⁸Ibid.

³⁹See, for example: Australian Law Reform Commission (2017), para 2.8 (note however that the ALRC uses statistics based on eighty-five years of age).

⁴⁰World Health Organization (2018).

⁴¹Australian Law Reform Commission (2017), 34.

⁴²Australian Human Rights Commission (2015); Australian Institute of Health and Welfare (2019b).

1.2.3 *Elder Law*

Older people have diverse legal requirements that are influenced by an array of both conflicting and interconnected considerations. These factors can include a person's age, socio-economic situation, education level, health, cultural and linguistic background, as well as their familial and care-based networks. Geographical location can also be a significant consideration, particularly for those in regional, rural and remote areas. It is anticipated that as the population ages, the associated legal requirements will similarly become more diverse and complicated.⁴³

The concept of 'elder law' is therefore a complex intersection of any and all substantive areas of law which apply to or interact with the challenges that can arise when a person is 'older'. These can present in any legal context but some of the most common include: succession and estate planning, especially wills and enduring powers of attorney; family law, with, for instance, the increasing prevalence of grandparents having responsibility for the care of grandchildren; equitable doctrines such as undue influence, unconscionable conduct and estoppel, all of which have prominent roles to play in addressing legal wrongs to older people; discrimination and employment law; as well as property and contract law in connection with accommodation and health needs such as retirement villages and aged care facilities. There is significant complexity not only in each discrete area of law but also in the way that these substantive areas interact with each other and with other socio-economic issues and frameworks, as well as with governmental and institutional responses. For example, the need to take on the care and responsibility for grandchildren, a family law issue, can force an older retired person back into the workforce thus potentially exposing them to discrimination and workforce issues. This can also have financial and estate planning, as well as accrued retirement benefit consequences, for the individual, not to mention the possible personal, familial and social impact.

Legal professionals may also not be equipped to adequately engage with older clients and their particular needs, such as accommodating hearing and sight impairments or early stage dementia. Such conditions can sometimes incorrectly be interpreted as signifying either a loss or lack of capacity. A legal professional's failure to recognise relational factors and/or individual attributes (such as language and speech) and personal abilities (such as visual, verbal and auditory functioning, and/or diminished or lost cognitive abilities) can also have a deleterious effect upon an older individual's ability to access justice and 'quality' legal representation. Significantly, in terms of a person's human rights, such an experience can, in turn, further infringe upon individual autonomy. An incorrect determination of a loss or lack of decision-making capacity can then attract a (potentially) unnecessary protectionist response, thus infringing further upon the person's own decision-making ability and other human rights.⁴⁴

In addition to these difficulties, there are a number of practical challenges presented by age itself, especially in the 'old, old' category. While age alone is not

⁴³Law Council of Australia (2018), 35.

⁴⁴Purser and Sullivan (2019), 88–98.

indicative of a lack of capacity there are age-related mentally disabling conditions, particularly in the ‘old, old’ category, that can impede upon an individual’s ability to engage with lawyers and the legal system.⁴⁵ Limited access to information can also infringe upon an older person’s ability to effectively engage with the legal system, particularly when considering technological literacy and reduced mobility. While new technologies have the potential to both enhance and compromise the enjoyment of a wide range of human rights, it must be acknowledged that not all older people are conversive with, nor want to use, technology. For example, in Australia, older persons have the second lowest level of digital inclusion.⁴⁶ While new technologies offer the possibility of many benefits, they should not be adopted blindly without reference to the issues arising from such adoption, including the potential infringement on the right to privacy and their use as vehicles for abuse.⁴⁷

With all this in mind, this book approaches elder law as not only a set of substantive legal fields, but also the associated and cross-cutting issues which determine the nature of older persons’ interactions with the legal system. Ageism, legal capacity, abuse and access to justice are key considerations here. Dedicated chapters follow later on ageism, capacity and abuse, but these concepts, like access to justice, remain relevant to many substantive areas and connections will therefore be noted where relevant throughout.

1.2.4 Ageism

Ageism is ‘stereotyping, prejudice, and discrimination against people on the basis of their age’.⁴⁸ The negative attitudes which are representative of ageism are rife. For example, consider the workforce where discrimination against older workers has been documented.⁴⁹ Consider also, the health and aged care settings where older adults are often at their most vulnerable.⁵⁰ Older people can erroneously be viewed as frail and dependent, as well as a burden on society. Ageism can also act as a powerful barrier to accessing justice, particularly for those who have experienced elder abuse.⁵¹ It can therefore impede the development of sound policy and best practice.

Ageism can also represent a violation of specific human rights depending on the context in which it is present. Relevant rights include the right to work, and particularly the right to gain a living by work of one’s own choosing.⁵² The rights

⁴⁵See, for example: Purser (2017); Purser and Lonie (2019).

⁴⁶Australian Digital Inclusion Index (2020).

⁴⁷See, for example: Lewis et al. (2018b).

⁴⁸World Health Organization (2017b).

⁴⁹Australian Human Rights Commission (2016).

⁵⁰World Health Organization (2015).

⁵¹World Health Organization (2017b).

⁵²ICESCR, art 6.

to education,⁵³ to equality before the law,⁵⁴ and to healthcare can all potentially be undermined where ageism is present. Human rights are also relevant to the steps which are taken by governments to protect and support older persons. The right to privacy,⁵⁵ for example, must be respected in all measures which relate to older persons, even when those measures are designed to act in the older person's best interests. The right to social security also imposes a requirement that support provided by the government to older persons must be sufficient to enable them to live a life of dignity, and must avoid ageist assumptions about the kind of lives that older people lead.⁵⁶

Although ageism is garnering increasing recognition as a danger to the enjoyment of human rights by older persons, little is being done by way of active measures to identify, measure and/or combat its insidious effects.⁵⁷ Consequently, the promotion of stereotypes of older people as being incompetent, slow and/or an economic burden (amongst other negative imagery) can become a self-fulfilling prophecy, negatively affecting both the individual and society more generally.⁵⁸ By perpetuating harmful perceptions of older persons, and denying full and equal respect and participation, ageism therefore operates as a driver of elder abuse.

It is therefore clear that we must seek to improve understandings of the multiple benefits which flow from the full participation of older people in local communities and society more broadly.⁵⁹ Despite this, there has been limited discussion about the effective implementation of education measures, quantifiable outcomes and/or funding models to achieve these objectives. Instead, the discourse seems currently restricted to high level, aspirational statements about ageism which, although understandable, will need to be given practical effect if there is to be any success in combating the damaging effects of ageist attitudes. The harmful effects of ageism and the potential of a human rights-based approach to help combat age-based stereotypes will be discussed in greater detail in Chap. 5.

1.3 Rates of Demographic Change

A precondition of analysing and responding to the human rights implications of the ageing population is having an accurate understanding of the scale and nature of that demographic shift. The statistics around ageing are often said to be 'alarming', itself an example of how powerful and emotive the choice of language can be. However, they do demonstrate that populations worldwide are ageing. This is because of three

⁵³Ibid., art 13.

⁵⁴ICCPR, art 26.

⁵⁵Ibid., art 17.

⁵⁶ICESCR, art 9.

⁵⁷For example: Recommendation 3–3(b) in Australian Law Reform Commission (2017), 9.

⁵⁸Winick (1996), 21.

⁵⁹See, for example: Australian Law Reform Commission (2017), Recommendation 3–3(b), 9.

main contributing factors: fertility, mortality and migration.⁶⁰ Globally, all regions have seen a significant growth in life expectancy since 1950.⁶¹ Improvements to health and associated care in older age account for a significant proportion of the increased rates of longevity, especially when considered in light of slowing fertility rates.⁶² Where countries experience significant rates of migration, this can also be a factor given that immigrants tend to be of working age.⁶³ The rates of ageing are also expected to increase as the ‘baby boomer’ generation retires.⁶⁴

It is anticipated that the number of people aged sixty years and over worldwide is expected to reach approximately two billion by 2050.⁶⁵ This is just over double the number of older people in 2017 (962 million).⁶⁶ The year 2050 will also see 1 in 6 people being over sixty-five years of age (16%), up from 1 in 11 in 2019 (9%).⁶⁷ In fact, between 2015 and 2050 it is estimated that people aged over sixty years will almost double in number rising from 12 to 22% of the world’s population.⁶⁸ Further, for the first time in history, 2018 saw the number of people aged sixty-five years and over outnumber children aged under five year globally.⁶⁹ By 2050 it is estimated that there will be more people aged over sixty than children and young adults aged 10–24 (2.1 billion as opposed to 2.0 billion).⁷⁰ The number of people in the ‘old, old’ category is anticipated to triple, rising from 143 million in 2019 to 425 million by the year 2050.⁷¹ Of the anticipated increase in numbers of ‘older people’, it is generally expected that older women are more likely than older men to live alone.⁷² It is also anticipated that two thirds of older people globally are resident in developing regions with close to eight out of ten older people living in developing regions by 2050.⁷³

Similar trends of ageing can be seen around the world. In fact, it is anticipated that there will be an increase in the number of people aged sixty years and over between now and 2050 in all 201 countries and/or areas with more than 90,000 residents,⁷⁴ with the ageing population being the ‘most advanced’ in North America and Europe. It is estimated that by 2050 older persons will account for 35% of Europe’s population, 28% in Northern America, 25% in Latin America and the Caribbean, 24% in Asia,

⁶⁰United Nations, Ageing; Parliamentary Budget Office (2019), 3.

⁶¹United Nations, Ageing.

⁶²Ibid.

⁶³Ibid.

⁶⁴Parliamentary Budget Office (2019), iv.

⁶⁵Kornfeld-Matte (2016), 5: 17.

⁶⁶United Nations Department of Social and Economic Affairs, Population Division (2017).

⁶⁷United Nations, Ageing.

⁶⁸World Health Organization (2018).

⁶⁹United Nations, Ageing.

⁷⁰United Nations Department of Social and Economic Affairs, Population Division (2017).

⁷¹Ibid.; United Nations, Ageing.

⁷²United Nations Department of Social and Economic Affairs, Population Division (2017).

⁷³Ibid.

⁷⁴Ibid.

23% in Oceania and 9% in Africa.⁷⁵ In Australia, for example, the number of people aged eighty-five years and over is expected to increase from 400,000 in 2010 to 1.8 million by 2050 with twice as many women than men in the eighty-five year and over age bracket.⁷⁶ In fact, the Asian-Pacific region is said to be at the forefront of the ageing phenomenon with one in four people anticipated to be aged sixty years or over by 2050.⁷⁷

In Europe, the number of older people is expected to increase while the number of working-age people declines which results in an increase to the old-age dependency ratio. Notably, the rates of people aged eighty-five years and over is expected to increase to 40 million by approximately 2050 (up from 14 million presently).⁷⁸ In the United Kingdom, there are approximately 12 million people aged sixty-five years and over with 1.6 million aged eighty-five years and over.⁷⁹ It is estimated that one in five people will be aged sixty-five years and over by 2030 with 3.2% of people in the old, old category. In fact, the eighty-five years and over age range is thought to be the fastest growing cohort with an expected 3.2 million by 2041.⁸⁰ Canada and the United States of America tell a similar story. Older people are expected to comprise 23% of Canadians (9.5 million) by 2030.⁸¹ By the same year, one in every five residents in the United States of America will be aged sixty-five years and over.⁸² The precise legal implications of these changes will of course vary from one jurisdiction to another, influenced by a range of factors and requiring responses tailored to each society and its legal system. However, variations of a number of common legal issues are emerging around the world, and the shared experience of ageing demographics allows for valuable lessons to be learned from other jurisdictions. A select range of key issues are addressed in this book which will be introduced in the following sections.

1.4 Select Legal Challenges

The ageing population offers a wealth of opportunity.⁸³ Opportunities exist for individuals to engage in further education, to spend more time with loved ones and to work longer if they so wish and are physically and cognitively able. Opportunities also exist to contribute to society in general, and for society to learn from the wisdom

⁷⁵Ibid.

⁷⁶Australian Bureau of Statistics (2010), 3201.0; Australian Government (2010), 56.

⁷⁷United Nations Population Fund Asia and the Pacific (n.d.).

⁷⁸World Health Organization Regional Office for Europe (2020), Demographic Trends, Data and Statistics on Ageing.

⁷⁹AgeUK (2019).

⁸⁰Ibid.

⁸¹Government of Canada (2014).

⁸²United States Census Bureau (2018).

⁸³Vienna International Plan of Action on Ageing (1982), 23–24 ('VIPAA').

and experiences of older people.⁸⁴ Indeed, older people often ‘serve as the transmitters of information, knowledge, tradition and spiritual values: this important tradition should not be lost.’⁸⁵ However, several challenges emerge in ensuring the enjoyment of these opportunities, and in fostering the ability of older people to contribute to their local communities and society more broadly, however they so choose. First, people are living longer, but it is often without the ability to be able to make their own, legally recognised decisions. Therefore, questions of capacity are significant as individuals age, particularly for those in the ‘old, old’ age category. Issues also arise in relation to financial management and what is to happen in anticipation of and upon retirement, as well as what financial and other services are available through government-supported welfare systems. Connected to this is the issue of accommodation, as well as the issue of access to quality health and aged care. Again, people are living longer but whether it is with a high quality of life is a separate, and significant, question. It is also important to acknowledge what it means to age as a woman given the various gender-based issues associated with employment, income, pensions, and unpaid family and care work. Significant issues are also arising in relation to elder abuse, which is occurring at increasing rates and can take many forms. Across all of these areas the issue of access to justice is a consistent consideration. The following discussion is only intended to highlight some of these main themes that are currently emerging. Several select elder law-specific issues will then be discussed further throughout the remainder of the book within the overarching human rights framework developed in Chap. 3.

1.4.1 Capacity and Decision-Making

Capacity is an invaluable legal and social construct.⁸⁶ This is because it is demonstrative of individual autonomy within familial and wider societal, including legal, circumstances. It is also the legal construct by which an individual is assessed to be able to make legally recognised decisions. Notions of legal and clinical capacity are interconnected, with assessments being complex.⁸⁷ As people grow older, and particularly for people in the ‘old, old’ category, they are often, and frequently erroneously, viewed as being vulnerable and incapable of making their own decisions. Consequently, their dignity is affronted as they are marginalised and excluded from decision-making processes.⁸⁸ Appropriate laws and policies around capacity are therefore essential to addressing this problem.

⁸⁴Ibid., 22.

⁸⁵Ibid., 74.

⁸⁶Carney (1997), 1.

⁸⁷Purser (2017).

⁸⁸VIPAA, 61.

Capacity and its effect on individual decision-making is garnering increasing attention.⁸⁹ As people age, and the incidents of mentally disabling conditions increase, the need for capacity assessments will grow.⁹⁰ Empirical evidence is limited in relation to the number of, and reasons for, capacity assessments being undertaken, with a particular shortage of recent empirical research. However, in the United States of America in the 1980s there was a 50% increase in the total number of referrals for capacity assessments for older people.⁹¹ Although age is not automatically indicative of a lack of capacity, there are age-related conditions which mean that issues of capacity tend to escalate as individuals age, particularly for those in the ‘old, old’ category. This is because for the people in this category, capacity will start to wane—it is a question of the rate at which cognitive decline will occur, not if it will happen. Having said this, it is important to remember that in legal contexts there is a general (rebuttable) presumption of capacity. That is, every person over the age of eighteen is assumed to have capacity unless proven otherwise.⁹² In ascertaining whether or not the presumption of capacity has been successfully rebutted, the courts – the final arbiters of capacity—may consider lay evidence from family members, friends and carers as well as ‘expert’ evidence from independent parties such as health, allied health and legal professionals.⁹³

Capacity assessments are currently conducted on an ad hoc basis lacking guidance as to best practice.⁹⁴ There is often a (necessary) multidisciplinary approach to assessments.⁹⁵ However, legal, health and allied health professionals are not necessarily well-versed in working collaboratively to assess clinical concepts of capacity, for example the nature and stage of dementia, within the requisite legal framework. Capacity is time and decision specific, and different considerations and standards may apply depending upon the particular capacity concerned, for example capacity to make a will, marry, execute a contract, or drive.⁹⁶ An incorrect assessment of capacity has significant ramifications because it curtails an individual’s autonomous ability to make legally recognised decisions.

As stated, autonomy is an inherently interconnected concept with capacity.⁹⁷ This is because in order to exercise one’s autonomous decision-making ability, a person has to have the requisite legal capacity to make the decision in question at the specific time. Autonomy is also one of the fundamental principles underlying modern human rights jurisprudence. Therefore, given that capacity is an increasing issue for

⁸⁹See, for example: Triebel et al. (2018), 219–235. Purser and Sullivan (2019); and Purser and Lonie (2019).

⁹⁰Purser and Sullivan (2019).

⁹¹Sullivan (2004), 134.

⁹²Re Caldwell [1999] QSC 182, [12] (Mackenzie J). Law Reform Committee, Parliament of Victoria (2010), 109–110.

⁹³Cockerill et al. (2005), 29.

⁹⁴Purser (2017).

⁹⁵Purser and Rosenfeld (2014), 483–5.

⁹⁶Lonie and Purser (2017); Purser and Sullivan (2019).

⁹⁷Purser and Sullivan (2019).